IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT HUNTINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v. Civil Action No. 3:18-cv-01289

MATTHEW MALLORY,
ALTERNATIVE MEDICINAL OPTIONS, LLC,
GARY KALE, GRASSY RUN
FARMS, LLC, their agents,
servants, assigns, attorneys, and all
others acting in concert with the
named defendants,

Defendants.

REPLY MEMORANDUM IN SUPPORT OF THE MOTION OF THE UNITED STATES OF AMERICA TO STAY ORDER ENTERED ON JANUARY 17, 2019, (ECF NO. 60)

The Mallory defendants continue to overlook the federal legal requirements for growing "hemp." Under federal law, cannabis harvested is classified as "hemp" only if the harvested crop contains no more than .3% of THC. See 7 U.S.C. § 5940. If the harvested cannabis contains in excess of .3% THC, then it is classified as "marijuana" under federal law. 21 U.S.C. § 802(16). The only way to determine whether an alleged "hemp" crop meets the statutory requirements to be classified as "hemp" rather than "marijuana" is to perform THC level testing on representative samples from the crop. This statutory THC standard is set by federal law, not state law. See 7 U.S.C. § 5940(b)(2); 21 U.S.C. § 802(16). Thus, the controlling question before the Court is under federal jurisdiction.

While the Mallory defendants claim that the United States is being disingenuous by requesting THC level testing at this stage in the proceeding, it is actually the Mallory defendants

who are being disingenuous with the Court. The Mallory defendants were well aware of the fact that their harvested cannabis crop had to be tested for THC levels before it could be used for any purpose. The WVDA made it clear in its application materials that all purported "hemp" crops had to be tested for THC levels before the crop could be used. The WVDA materials state that licensees are required to notify the WVDA at least 30 days in advance before harvesting the "hemp" crop so that THC level testing could be arranged. The materials also made it clear that any crop tested and found to have a THC level in excess of .3% could be destroyed. This was discussed at the original hearing in this case, and the Mallory defendants presented an exhibit containing this requirement to the Court. See ECF 16-1 at p. 3 ("Once the crop is established the applicant is responsible for notifying the WVDA 30 days before the projected harvest date. The WVDA will arrange to visit and collect sample/s to verify the THC content is below 0.3%. (*The cost of the visit, sampling and testing is the responsibility of the applicant. Costs can be estimated by the 'Industrial Hemp Sampling Invoice'. If the crop is tested and found to be more than the amount allowed, destruction may be required.*").") (emphasis in the original). The United States also informed the Court of this requirement and presented a similar document from the WVDA into evidence at the injunction hearing. See also ECF No. 19-7 at p. 2.[1]

As these documents and federal law make clear, the burden was clearly on the Mallory defendants to send the required notice and make the necessary arrangements with the WVDA for the THC level testing to take place before the crop was moved out of West Virginia. Id. While the Mallory defendants argue that the United States should have requested that THC level testing be performed earlier, it was actually the burden of the Mallory defendants—not that of the

[1] The Mallory defendants were aware of this requirement when they applied for a hemp grower's license in 2017 with the WVDA and in 2018 when they submitted amended applications for a hemp grower's license. See ECF Nos. 16-1, 19-7.

United States—to make THC level testing arrangements with the WVDA. That simply was not done here. There is no dispute that the crop was not tested as required. The Mallory defendants could have made these arrangements at any time during these proceedings after the crop had been dried, but they failed to do so. The test timing issue is a failure by the Mallory defendants, not the United States.

In this case, Mallory did not arrange with the WVDA to have the requisite THC level testing performed before the crop was transported across state lines. The WVDA cannot now perform the requisite THC level testing required by federal law since the crop is now located in Pennsylvania and no longer under the jurisdiction of the State of West Virginia. Moreover, the WVDA has stated in a recent article that its equipment to perform such testing is now broken, and the WVDA does not now have the capability to perform such testing. See Exhibit A attached to this Reply at p. 3 ("Crescent Gallagher, a spokesman for the West Virginia Department of Agriculture, which regulates industrial hemp, said the department has not tested the farmers' crop since the harvest, citing a broken machine.").

As a result, there should be no problem allowing the United States to arrange for THC level testing to be performed to determine whether the crop meets the "hemp" standard under 7 U.S.C. § 5940 or whether it is "marijuana" as defined under 21 U.S.C. § 802(16). The THC level testing is to determine compliance with a federal standard. If the crop is "marijuana" as defined by 21 U.S.C. § 802(16) and not "hemp," then the United States could apply to the Court to enforce its right to seize and destroy the crop. See 21 U.S.C. § 881(g)(1). See Gonzales v. Raich, 548 U.S. 1 (2005) (upholding DEA's destruction of plants determined to be marijuana under the CSA purportedly grown pursuant to a state medical marijuana program). The bottom

line is that the burden is on the Mallory defendants to prove that the crop is not "marijuana" as defined by the CSA. See 21 U.S.C. § 885(a)(1); 21 C.F.R. § 1308.35.

Interestingly, the Mallory defendants are asking the Court to deny the request of the United States to stay distribution of the crop to allow THC level testing to determine whether the crop is actually "hemp" under federal law. ECF No. 63 at p. 3. However, counsel for the Mallory defendants was quoted in a recent newspaper article as stating: "Goodwin said although the move to request the THC testing 'reeks of desperation,' and ***Mallory has no problem seeing the crop tested***." See Exhibit A attached to this Reply at p. 3 (emphasis added). The Mallory defendants are trying to play both ends of the argument by presenting one position with the Court and then presenting the opposite position to the media. That is the height of being disingenuous with this Court. Based on the statement of counsel for the Mallory defendants in the media, the Court should allow the United States to conduct the requested THC level testing of the alleged "hemp" crop since the Mallory defendants have "no problem seeing the crop tested." Id.

The Mallory defendants are continuing their pattern of circumventing federal law requirements regarding hemp. Federal law required that they acquire seed to grow hemp pursuant to a hemp pilot project program permitted under 7 U.S.C. § 5940. Just as they circumvented the requirements for properly acquiring seed, they are now trying to circumvent the requirement that their crop be tested for THC levels to determine whether it is actually "hemp" or "marijuana." They have moved the crop outside the state of West Virginia without having the crop submitted for THC level testing as required by federal and state law. If they have nothing to hide, then they should have no problem with the United States conducting the requisite THC level testing to determine if the crop is actually "hemp" or whether it is "marijuana" as defined by federal law. Since the WVDA is unable to conduct the required THC

level testing, and the crop has been moved to Pennsylvania and outside the jurisdiction of the WVDA, this Court should allow the United States to perform the requested THC level testing. The United States has the necessary resources and capability to perform the required THC level testing.

The statutory requirements of the CSA and 7 U.S.C. § 5940 were enacted for a clear purpose--to allow legitimate growers to be able to grow “hemp” under the terms of a legitimate state pilot project program, while at the same time protecting the public by making sure that growers would not try to pass off "marijuana" crops as "hemp" crops and allow an illegal Schedule I substance under the CSA to be manufactured and distributed. The only method to ensure that the crop grown and harvested in this case is actually "hemp" as defined under federal law is to subject the crop of the Mallory defendants to testing for THC levels. The Mallory defendants have long been aware of this requirement and should not be allowed to circumvent federal law.

In this case, the Mallory defendants have tried to avoid THC level testing of their alleged "hemp" crop by moving their crop across state lines without submitting their crop for required THC level testing. The United States should be allowed to test the alleged "hemp" crop to determine whether it is actually "hemp" as defined under 7 U.S.C. § 5940 or "marijuana" as defined by 21 U.S.C. § 802(16). This testing would involve taking representative samples from the crop and testing them for THC levels. Since counsel for the Mallory defendants has told the media that his clients have no objection to having the testing performed, the Court should enter an order allowing the United States to proceed with THC level testing of the alleged “hemp” crop of the Mallory defendants. The Court should also preclude the crop from being further processed, sold, or distributed until the results of that testing are known and are reviewed by the

Court. The United States stands ready to perform THC level testing on the alleged "hemp" crop of the Mallory defendants in an expeditious fashion. [2]

Respectfully submitted,

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[2] It should be noted that THC level testing of hemp is also mandated by the Agricultural Improvement Act of 2018, Public Law No: 115-334, § 10113 (Sections 297B & 297C) whether the crop is grown subject to an approved state hemp program or subject to a USDA plan. Thus, this federal testing requirement remains in effect to ensure that crops grown as “hemp” are actually “hemp” and not “marijuana.”

CERTIFICATE OF SERVICE

I, Fred B. Westfall, Jr., Assistant United States Attorney for the Southern District of West Virginia, hereby certify that on January 23, 2019, I electronically filed the foregoing **REPLY MEMORANDUM IN SUPPORT OF THE MOTION OF THE UNITED STATES OF AMERICA TO STAY ORDER ENTERED ON JANUARY 17, 2019, (ECF NO. 60)** with the Clerk of the Court using the CM/ECF system which will send notification to the following CM/ECF participants:

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EXHIBIT A

https://www.wvgazettemail.com/news/cops_and_courts/judge-increasingly-doubtful-of-feds-lawsuit-against-hemp-farm/article_bcd67986-b095-56c8-b737-214ee2da92db.html

Judge 'increasingly doubtful' of feds' lawsuit against hemp farm

By Jake Zuckerman Staff writer Jan 18, 2019

A federal judge voiced doubt this week over the U.S. government's civil prosecution of a Mason County hemp farm and related parties.

On Thursday, U.S. District Judge Robert C. Chambers lifted a stay in the case caused by the partial federal government shutdown and dissolved an injunction that prevented the farmers from transporting or selling their hemp.

But after U.S. Attorney Mike Stuart and his office made a motion seeking to test the hemp, Chambers delayed his lifting of the injunction until Wednesday, to give defendants a chance to respond to Stuart's request.

While Chambers noted that his Thursday order is not a final judgment, he said he has "become increasingly doubtful of the government's case on the merits" and mentions the passage of the federal Farm Bill, which legalized industrial hemp.

"Despite being enacted after the issues in this case arose, the 2018 Farm Bill expresses congressional intent that current public policy supports states exercising primary control over hemp production," the order states.

West Virginia legalized production of industrial hemp for commercial purposes in 2017 under an earlier iteration of the farm bill.

Stuart and his lawyers argued previously that the passage of the farm bill had no impact on the case because it happened after the alleged offenses. They also argued the farmers "created the problems of which they now complain" regarding contractual deadlines to process the hemp because they did not adhere to their original project description.

In a shift from the original thrust of the lawsuit, Stuart also argued that the injunction should remain in place because the defendants plan to use the hemp to produce CBD, which is generally illegal unless it comes in the form of Epidiolex, an FDA-approved drug.

Chambers brushed aside the CBD argument.

“The mere potential of a downstream use that may violate certain federal regulations does not entitle the government to an injunction on producing and selling the CBD isolate here,” the judge wrote. “In fact, there is no evidence before this court that defendants will be adding the CBD isolate to food or health products or making unsubstantiated health claims about the benefits of CBD without approval of these agencies.”

A lawyer representing Matthew Mallory, one of the farmers, said he was happy with Chambers’ Thursday ruling. He made those comments before Friday’s order, however.

“For my client, this isn’t an academic exercise, this is his livelihood,” Carte Goodwin said. “He was happy to see the court’s reasoning, happy to see the court express skepticism over the government’s case, and most importantly, happy to see he can harvest and sell his crop, which is what this whole case is about.”

Goodwin made his comments before Chambers’ order Friday temporarily keeping the injunction in place.

In the original lawsuit, Stuart alleged the defendants — Mallory, Alternative Medicinal Options LLC, Gary Kale and Grassy Run Farms — obtained their hemp seeds unlawfully in Kentucky, in violation of their licensure proposal with West Virginia.

Stuart also alleged they did not install security measures around the farm like fencing, a gate with a chained lock, cameras, and signage to note the difference between hemp and marijuana.

Hemp is a product legal under state and federal law that comes from the same cannabis sativa plant as marijuana, although is comprised of less than 0.3 percent of THC, the psychoactive component of marijuana.

According to information from Bob Troyer, a former U.S. attorney from Colorado who oversaw the state's transition in legalizing recreational marijuana, the average strain of marijuana is about 70 percent THC.

Stuart's lawsuit charges the farmers with the manufacturing, possession of, and intent to distribute marijuana — not hemp — in violation of the federal Controlled Substances Act (which no longer includes hemp, thanks to the Farm Bill).

Because the charges are civil and not criminal, the farmers' plants, property, equipment and seeds could all be seized and forfeited to the government. Stuart's complaint states the U.S. is subject to receive either $250,000 in civil penalties or twice the sum of the defendants' gross receipts, whichever is greater.

Late Thursday, Stuart filed a motion with the court stating the hemp "needs to be tested" to see if it's above the 0.3 percent THC threshold, which would make it marijuana in the eyes of the law, not hemp. He offered no evidence indicating reason to believe the hemp is above the threshold.

Crescent Gallagher, a spokesman for the West Virginia Department of Agriculture, which regulates industrial hemp, said the department has not tested the farmers' crop since the harvest, citing a broken machine.

Goodwin said although the move to request the THC testing "reeks of desperation," and Mallory has no problem seeing the crop tested.

"It's pretty disingenuous for the United States Attorney's office to use that as a grounds to further delay this case when they've had four months while the crop was sitting in Mason County to ask for this," he said.

Defense attorneys, who also include Elise McQuain and Philip Reale, responded to the motion late Friday night. They asked Chambers to reject Stuart's motion to test the hemp, arguing this is the first time Stuart's attorneys ever implied the hemp could be above the THC threshold.

This story was updated after publication to include the defense attorneys' Friday night filing.

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